

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDECK KEYSTONE ENERGY, LLC, a
Delaware Limited Liability Company,

Plaintiff,

v.

VICTORY ENERGY OPERATIONS, LLC, a
Delaware Limited Liability Company,

Defendant.

CIVIL ACTION

No. 04-CV-325E

Judge Sean J.
McLaughlin

COPY

VIDEOTAPED DEPOSITION OF:
CASPAR F. KOVARIK, JR.
taken on behalf of the Defendant
January 31, 2007

Reported by:
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1 projects. So if -- we are actually pursuing ethanol
2 projects. And we were pursuing an ethanol project,
3 doing some up-front engineering on the project, on the
4 Global project, that I think that this whole thing is
5 related to. And I was basically doing project
6 management work, leading a project team.

7 Q. Can you explain a little bit about what an
8 ethanol project is?

9 A. From our standpoint, we are an engineering
10 and construction company. We basically take a process
11 design from a process provider. In this case it was
12 Praj, P-R-A-J. And for the customer we basically will
13 do detail engineering, we will procure the equipment,
14 design, do the detail design, like piping design,
15 structural design, and then go out and manage
16 construction and basically, you know, take a design
17 and build a plant so that they can make ethanol.

18 Q. And when you are serving as a project
19 manager for construction of an ethanol plant, what
20 does that entail?

21 A. Well, as a project manager you oversee the
22 detailed engineering. Make sure that goes okay. You
23 are involved in procurement of the major equipment.
24 You know, there is -- the specifications are written
25 for the equipment to meet the process design, so you

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1 buy major equipment. You do detail design.

2 Then you also go out and get subcontractors
3 or direct hire to actually construct the plant. There
4 will be a construction manager who would report to the
5 project manager and, you know, basically you oversee
6 the design construction of the plant.

7 Q. Do you personally get involved with
8 preparing the specifications for a project?

9 A. Generally, kind of at a high level on the,
10 on this project. I've been involved in ethanol for
11 approximately three years, and so I've got a fairly
12 strong background in ethanol plant, kind of the basics
13 of it. And so I was, you know, I was fairly involved
14 in some of the mechanical equipment.

15 Q. Had you ever written specifications for the
16 purchase of watertube boilers, or any kind of boiler?

17 A. Well, I'm a mechanical engineer and when I
18 came to MECS, formerly Monsanto EnviroChem Systems,
19 I was basically a project engineer and maybe actually
20 worked in mechanical. I was a mechanical manager.
21 I was maybe somewhat involved. Generally I haven't
22 been that involved in writing specifications. But ...

23 Q. How long have you been a mechanical
24 engineer?

25 A. Well, I graduated in December, 1972.

1 So ...

2 Q. From where?

3 A. University of Missouri, Rolla, Missouri.

4 Q. What was your degree?

5 A. BS in Mechanical Engineering.

6 Q. Are you a licensed professional engineer?

7 A. Yes.

8 Q. In what state?

9 A. I believe I'm -- well, I'm definitely in
10 Missouri, Nebraska, and Michigan.

11 Q. Now, you've spoken of, or mentioned a
12 couple of times "this project" and you mentioned
13 "Global Ethanol". Can you explain to the jury what
14 the Global Ethanol project was?

15 A. The Global Ethanol project was a project
16 for a company called Global Ethanol that was a group
17 that was, their plan was to build five hundred-million
18 gallon per year ethanol plants at five different
19 sites. And ... Does that answer your question, or is
20 there ...

21 Q. Yes. Where is Global Ethanol located?

22 A. They are, I guess their home office that we
23 visited was in Minneapolis, Minnesota.

24 Q. And Global Ethanol is a separate company
25 from MECS, is that right?

11

1 A. Yes, they are, they are our customer.

2 Yeah, we don't have any interest in Global Ethanol.

3 They are a customer.

4 Q. And Global Ethanol was to be the owner on
5 the project, is that correct?

6 A. Yeah.

7 Q. And what was MECS's role with respect to
8 this potential project?

9 A. Well, our hope was to end up being the
10 engineering construction contractor. And in this
11 phase that we were working on, we were working to do
12 enough design work and estimating work that we could
13 come up with a definitive or a defined estimate that,
14 you know, that we could basically commit to build a
15 project at that cost.

16 Q. Were you able to develop that definitive
17 estimate?

18 A. No, we never quite finished it. We have
19 stopped work on that project at the moment. We --
20 there were changes in the process design. The
21 indicative cost of the project -- "indicative" being
22 sort of like, you know, you do enough work and you
23 start to get an idea of what it's going to cost -- the
24 indicative cost was a lot higher than what they were
25 thinking, or what kind of their budget was, so we

1 stepped back. And the process provider, Praj, did a
2 redesign to try to redesign the plant so that the cost
3 would be lower. And they did do a redesign, so that
4 means we had to kind of redo a lot, or most of our
5 work. And so that delayed the whole process.

6 And when Praj -- Praj does not have a lot
7 of experience in the industry in, in this US and in
8 corn plants. And the cost, what they came back to
9 redesign, still I'm not sure they really got down to
10 where the plant was going to be still cost-effective.
11 And so we did another indicative estimate. It was
12 kind of too high again. And we've kind of since
13 stopped work.

14 But we did propose a lot of cost-reduction
15 ideas, and Global is re-thinking that now, and
16 thinking about ways to get the project moving again.
17 But right now we are not working on the project.

18 Q. And ultimately, it's Global's decision
19 whether to proceed or not to proceed, is that correct?

20 A. Yeah, sure. They are paying the bill.

21 Q. And when you were talking about the
22 indicative cost being too high, that's for the project
23 as a whole?

24 A. Right.

25 Q. Now, the jury in this case has heard a lot

1 large project, and we were working with BE&K to
2 basically support our work because we really didn't
3 have enough engineers and staff to, to do this
4 project. So we were teaming up with, partnering with
5 BE&K to basically have enough staff to do the job.

6 They had an engineer named -- I forget at
7 the moment but he was kind of their lead mechanical
8 engineer. It will come to me in a minute. And then
9 he had some other engineers beyond him. I believe
10 they actually wrote the specification, kind of with
11 Tony's supervision. And I think they actually did the
12 bid, the formal bid evaluation.

13 Q. Now, you referred to a formal
14 specification. I would like to show you what's been
15 marked as Exhibit P-368. Is that, does that include a
16 copy of the bid specification for the project?

17 A. Yes, it looks like it.

18 Q. And what are the pages in Exhibit P-368
19 that include the bid specification for the boiler
20 package?

21 A. What are the pages?

22 Q. Yes. Is it the entire document?

23 A. Sure. It's the entire document. Yeah,
24 this whole package pretty much is what the boiler
25 vendors get, and use to give us a bid.

13

1 about boilers. And were there to be boilers used in
2 the project, if it were to go forward?

3 A. Right. Yes.

4 Q. Were you personally involved in the process
5 of trying to identify a boiler manufacturer?

6 A. Yes.

7 Q. What was your role?

8 A. Well, as project manager and kind of
9 leading the engineering team. And I was involved in
10 basically evaluating and meeting with bidders who had
11 given us proposals. So, you know, I was involved in
12 the details of that process.

13 Q. Are you part of the group who was making
14 recommendations on which --

15 A. Yes.

16 Q. -- bidder to select?

17 A. Yes.

18 Q. Who was involved in that group?

19 A. We have an engineer that's mechanical
20 supervisor, Tony Smith. He was involved. And the
21 mechanical engineers actually report to Tony. And
22 then we had another mechanical engineer. We were
23 working with a company called BE&K.

24 Q. What was their role?

25 A. This, the Global Ethanol project is a very

15

1 Q. Now, in this specification was MECS
2 dictating the kind of design that the boiler was to
3 have?

4 MR. SHEEAN: Objection. Vague.

5 THE WITNESS: Excuse me?

6 MR. SHEEAN: It's an objection. You can
7 answer.

8 THE WITNESS: You said an objection?

9 MR. SHEEAN: Yes, but you can go ahead and
10 answer.

11 MR. GISLESON: I will rephrase the
12 question.

13 Q. (By Mr. Gisleson) What's the purpose of
14 the specifications that are included in Exhibit 368?

15 A. Well, it's to basically give the boiler
16 vendors, manufacturers, the information they need so
17 they can give a responsive bid proposal for the
18 equipment to meet our needs. Basically it will pretty
19 much list the performance requirements, how much steam
20 it's going to produce at what pressure, what
21 temperature. And then it gives a lot of other
22 details. The kind of stuff that we've learned over
23 the years are stuff that may be required, we think, to
24 give a quality boiler.

25 Q. How many different companies submitted

1 as Exhibit P-381. Have you seen that before?

2 A. **I believe I have.**

3 Q. And this is a copy of a November 2nd, 2006

4 e-mail from John Merz to Mary Eudy, cc to John Burk,

5 is that correct?

6 A. **Yes.**

7 Q. And this includes language that MECS was

8 going it to seek from Victory, is that right?

9 A. **Correct.**

10 Q. And this says, "Let's modify the terms by

11 adding to the purchase order, "Seller's guarantees and

12 indemnities under Article 9, Patents of the Global

13 Ethanol Services purchase order general terms and

14 conditions shall include but shall not be limited to

15 claims that seller improperly used, or that goods

16 infringed the patents or otherwise used the

17 intellectual property rights of Indeck or Zurn

18 Technology, and notwithstanding Article 17, limitation

19 on purchaser's liability of the Global Ethanol

20 Services purchase order general terms and conditions,

21 or anything else in this purchase order or the terms

22 thereto, the indemnification under such Article 9

23 shall not be limited."

24 Did I read that correctly?

25 A. **Yes.**

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1 Q. Did you have any understanding as to how

2 John Merz learned of the word "Zurn" or any

3 relationship between Zurn and Indeck?

4 A. **I believe he learned about it from**

5 **conversations with the Indeck folks. I know there was**

6 **a conversation with Chris Petcos, there were**

7 **conversations with our purchasing folks, Mary Eudy,**

8 **and I was, I believe, on a conference call with at**

9 **least one of those conversations.**

10 **So I think it was brought up, my**

11 **recollection, in those conversations and it kind of**

12 **raised a flag for us. And you know, we certainly**

13 **didn't want to be buying equipment that had patent**

14 **infringement issues with it so, you know, we certainly**

15 **asked Victory and Protherm about that. And so, you**

16 **know, we wanted to make sure that, you know, we were**

17 **covered or indemnified if there were any issues.**

18 **I mean we didn't know if there were or not for sure.**

19 **You know, I think Victory was saying that, "You know,**

20 **we are not infringing," or, "There aren't any issues."**

21 **But we've got this legal action, blah, blah, blah.**

22 **So ...**

23 Q. This is dated November 2nd, which is before

24 the meeting you had with Indeck, correct?

25 A. **Correct.**

1 Q. Do you have a specific recollection as to

2 the date when you first heard the name Zurn?

3 A. **No.**

4 Q. Do you have a specific recollection as to

5 when someone from Indeck for the first time used the

6 word Zurn?

7 A. **No.**

8 Q. And VEO agreed to the proposed

9 indemnification language, is that correct?

10 A. **I presume they did, but I, that was**

11 **something that our purchasing group, the buyer would**

12 **handle. They generally handled commercial terms and**

13 **conditions, and getting that negotiated with**

14 **suppliers, vendors.**

15 Q. You were not personally involved?

16 A. **I wasn't personally. And I presumed that**

17 **they had agreed to it, but I don't know that for a**

18 **fact.**

19 Q. And after the meeting with Indeck on

20 November 8th, 2006 MECS still recommended the Voyager

21 as the boiler that the owner, Global Ethanol, should

22 purchase, is that correct?

23 A. **We didn't change our mind. We didn't, we**

24 **didn't buy it because, because of where the project**

25 **stood. We didn't reiterate our recommendation, but we**

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1 **didn't rescind it, either. So, you know, we certainly**

2 **had the concern.**

3 **I think Victory, from what I knew, had**

4 **assured us that there were no issues and that they**

5 **had, they were willing to agree to this term, so we**

6 **weren't planning on changing our recommendation.**

7 Q. Now, do you have the final proposal from

8 VEO from October 16, which I believe is Exhibit 379?

9 A. **Yes.**

10 Q. Did you ever ask VEO if they could see --

11 strike that.

12 Did you ever ask VEO if it would provide

13 copies of proposals that it had submitted for the

14 Keystone boiler, to see how the proposals for the

15 Keystone boiler compared to the proposals for the

16 Voyager boiler that it was providing to MECS?

17 A. **No.**

18 Q. I would like to show you what's previously

19 been marked as Exhibit P-301. Do you see how this

20 appears to be a proposal submitted by Protherm dated

21 August 20, 2004 on the first page?

22 A. **Yeah. Yes.**

23 Q. If you turn to the second page, do you see

24 how it appears to have been submitted by John

25 Wiesehan?

1 A. We probably have, but we don't do that to
2 gain the technology from our competitors.

3 Q. No, but when you hire employees, you look
4 for people in the experience in the field, don't you?

5 A. Yes.

6 Q. And you understand that any know-how that
7 they have that is not subject to a confidentiality
8 provision that they bring in with them is an asset
9 that they bring to the table for the company?

10 MR. GISLESON: Objection.

11 A. Right, if they are not, if they are not, if
12 it doesn't break their confidentiality agreement with
13 their employer.

14 I mean we actually, as employees, we have
15 to sign a non-compete confidentiality contract with
16 MECS so we can't just to go our competitor and do what
17 we are doing here. And we wouldn't, we wouldn't hire
18 a competitor's employee to get their technology.

19 Now, if we hired them, then it would be to
20 use what they know that does not infringe upon their
21 employer's --

22 Q. (By Mr. Sheean) You certainly want to use
23 what's known in the public, what they've gleaned
24 that's in the public domain, though, correct?

25 A. Correct.

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1 Q. Now, you said if somebody, one of your
2 competitors got a hold of your drawings and copied
3 those, you consider that to be improper, right?

4 A. Yes.

5 Q. Now, if you circulate that drawing as part
6 of an advertisement or when you submit a bid, it's out
7 there. You really can't control that drawing any
8 more, isn't that true?

9 A. Basically, I guess it depends. Our
10 drawings do have confidentiality stamps on them. And
11 when we sell customers, our proposals include a
12 confidentiality statement, as our contracts do.

13 And so I mean you cannot control if
14 somebody sort of wants to illegally break that, I
15 mean, but we do try to control the dissemination of
16 our information.

17 Q. Yeah. But if your drawing goes out to a
18 customer with no, no provision there saying that they
19 can't use it, then you really can't control where that
20 drawing goes?

21 A. If it doesn't have, yes, if it doesn't have
22 that statement, right.

23 Q. What is your sense of whether or not the
24 Global Ethanol project will go forward?

25 MR. GISLESON: Objection. It calls for

1 speculation. Lack of foundation.

2 Q. (By Mr. Sheean) As the engineer on the job
3 who has been involved in it from the first day, what
4 is your sense of whether or not the Global Ethanol
5 project will go forward?

6 A. I think it will probably go forward with
7 one project out of originally the concept of five, and
8 we might not be the contractor on it. My guess is
9 that it's, you know, it's probably 50/50. You know,
10 the economy is, economics of ethanol are kind of ...
11 Corn is going up. Ethanol prices are going down. The
12 market is being kind of saturated with ethanol, so to
13 speak. I mean, so, you know, it's probably 50/50.
14 Maybe a little better, I will go.

15 Q. At this point if MECS obtained the Global
16 Ethanol project, would it go forward with retaining
17 Victory Energy as the boiler supplier, based on what
18 you know today?

19 A. Yeah, we don't -- yes. We don't know that
20 Victory has infringed on Indeck's know-how or, you
21 know, their technology so, you know, our plans would
22 be to continue on unless we, you know, it was clear
23 that there was a problem.

24 MR. SHEEAN: Those are all the questions
25 I have at this time.

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REDIRECT EXAMINATION

QUESTIONS BY MR. GISLESON:

3 Q. You were asked about the proven design
4 requirement in the specifications. Is it correct that
5 this deposition is the first time you learned that the
6 Voyager was not introduced into the market until
7 January, 2006 and that the first sale was March, 2006?

8 A. If that's correct, it's the first that I
9 knew that the Victory boiler -- again, well, that
10 five-year thing is kind of like, you know, it's a
11 standard clause that we put in everything that we send
12 out, and we do take exception to it carefully.

13 I guess in my mind it was a type boiler
14 that is common in the industry. The burner design
15 probably was a key thing for emissions and for the
16 boiler performing, and I don't think the boiler, or
17 the burner comes from Victory. I think that's
18 something they buy from I believe Todd.

19 And I guess, as I said before, I didn't
20 think the boiler, the watertube, walls and watertube
21 was something that, you know ... My guess is that
22 Victory and Indeck might buy the tubes for the boiler
23 from the same tube supplier. So it's not like you
24 are, you know, building something that, you know,
25 hasn't been built before. So ...